

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 September 2004

BALCA Case No.: 2003-INA-226
ETA Case No.: P2001-CA-09509821/ML

In the Matter of:

KARIM AMIRYANI,
Employer,

on behalf of

GLORIA MENDOZA,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Steven Blalock, Esquire
Los Angeles, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a private household for the position of Household Manager. (AF 33-34).² The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF"). 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² "AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

On January 10, 2000, the Employer, Karim Amiryani, filed an application for alien employment certification on behalf of the Alien, Gloria Mendoza, to fill the position of Household Manager, classified as Housekeeper, Home. Minimum requirements for the position were listed as two years of experience in the job offered. The job duties included supervising activities in a private household, managing cooking and serving of meals, cleaning, laundry, paying bills, coordinating budgets, hiring employees, scheduling personnel, and ordering food, cleaning, and other household supplies. The Employer received no applicant referrals in response to its recruitment efforts for the position. (AF 39- 42).

A Notice of Findings (“NOF”) was issued by the CO on November 13, 2002, proposing to deny labor certification based upon a finding that the Employer’s job requirement of two years experience in the job offered was unduly restrictive, and thus in violation of 20 C.F.R. § 656.21(b)(i)(A), in that it is not normally required for the successful performance of the job in the United States. The CO observed that “[h]ome Housekeeper is a supervisory position but box 17 indicates you have no employees. If this position is actually that of General Houseworker, the usual experience called for in that position is one to three months.” The Employer was instructed to rebut the findings by either deleting the restrictive requirement and retesting the labor market or justifying the restrictive requirement on the basis of “business necessity” or documentation that it is usual in the occupation/industry. (AF 29-31).

In Rebuttal, the Employer attempted to document business necessity for its experience requirement, stating that the petitioned position will oversee the care of a 7,000 square foot building on a three-quarter acre lot in a community with strict restrictions on the upkeep and maintenance. The Employer states:

[t]his position requires someone who can supervise and coordinate the activities of the household while I am out-of-town or unavailable. This supervision includes overseeing a series of independent contractors including but not limited to the gardener who comes five times a week, the pool man who comes two times

a week, handymen or maintenance men who come at least once a week. Additionally, there is a full-time houseboy who runs errands and assists in the cleaning and preparation of meals.

(AF 27-28).

A Final Determination (“FD”) denying labor certification was issued by the CO on May 13, 2003, based upon a finding that, despite the NOF’s specific request, the Employer had failed to provide documentation justifying its excessive requirement as either normal to the occupation or based on business necessity. (AF 10-11).

The Employer filed a Request for Review by letter dated March 29, 2003, and the matter was docketed by the Board on July 1, 2003. (AF 1-9). The Employer’s Supplemental Brief was received in this Office on December 17, 2003.

DISCUSSION

Twenty C.F.R. § 656.21(b)(2) requires an employer to document that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the successful performance of the job in the United States. One of the measures by which a job requirement is tested to determine whether it is unduly restrictive is inclusion of the requirement in the definition of the job in the *Dictionary of Occupational Titles* (“DOT”). To determine whether a particular job requirement falls within the applicable DOT code, the CO must determine the job title which best describes the job and determine whether the job requirements specified by the employer fall within those defined in the DOT. *LDS Hospital*, 1987-INA-558 (Apr. 11, 1989)(*en banc*). Where the employer cannot document that the job requirement is normal for the occupation or that it is included in the DOT, the Employer must establish business necessity for the requirement. 20 C.F.R. § 656.21(b)(2). Pursuant to the holding in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*), in order to establish “business necessity” an employer must show that the

requirement is essential to performing, in a reasonable manner, the job duties as described.

In the instant case, the CO requested justification for the Employer's requirement of two years of experience on the basis that the job of Home Housekeeper is a supervisory position yet the ETA 750A, box 17 indicated that the Employer has no employees. The CO noted that the position of General Houseworker calls for only one to three months of experience. The Employer was instructed to document business necessity for the more stringent requirement.

In rebuttal, the Employer simply made a general statement that the supervision would include overseeing a series of independent contractors, including a gardener, pool man, and handymen or maintenance men, as well as a full-time houseboy. The Employer provided no documentation to substantiate these assertions, such as names, contracts, evidence of employment, or payroll checks. The Employer states that he employs a full-time houseboy, yet the ETA 750A clearly states that the Alien will not supervise any employees. As was noted by the Board in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), "a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof." *See also A.V. Restaurant*, 1988-INA-330 (Nov. 22, 1988); *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989).

The burden of proof in the labor certification process is on the employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b). Moreover, "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Carlos Uy, supra*.

In the instant case, the Employer failed to provide documentation to adequately rebut the issue raised by the CO in the NOF, and accordingly, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.